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No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MARK A. HUMPHREY AND FREDD J. HAAS,
d/b/a HUMPHREY & HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Do the standards established by this Court under the First Amendment for regulating lawyer advertising apply to advertising on television?

2. Are Iowa's rules banning "dramatic" voices and "self-laudatory" statements in lawyer advertising impermissibly vague, on their face or as applied?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Iowa Supreme Court's initial opinion in this case (App. 1a-24a) is reported at 355 N.W.2d 565. Its opinion on remand from this Court (App. 25a-55a) is reported at 377 N.W.2d 643.

JURISDICTION

The judgment of the Iowa Supreme Court, embodied in its opinion (App. 25a), was issued on November 13, 1985. A notice of appeal to this Court (App. 56a) was timely filed on November 20, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Insofar as any of the questions presented may properly be here on certiorari rather than appeal, this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U.S. Const., Amend. XIV, § 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers is set forth in Appendix D (App. 58a-65a).

STATEMENT

This case involves the scope of a state's power under the First Amendment to restrict lawyer advertising on television. The controversy centers on DR 2-101(B) of the Iowa Code of Professional Responsibility for Lawyers, which permits lawyers advertising on television to display only what may appear in a printed advertisement; the only sound allowed is the "nondramatic" voice of an announcer reading the message that is displayed. Other than in illustrations or photographs, no one may appear on screen. The lawyer himself may not address his audience.[1]

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[1] DR 2-101(B) currently provides that information allowed in print advertisements may be communicated by radio or television,

> "articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound. . . . In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer." (App. 59a.)

Prior to amendments to the rules issued by the Iowa Supreme Court on November 8, 1985, lawyers were forbidden to use illustrations or pictures in print advertising, and could display "words and numbers only" in television advertising. Under the rules as amended, it appears that lawyers advertising on television may display illustration and

The Iowa Supreme Court in September 1984 enjoined the appellants from airing advertisements that contravene DR 2-101, and sustained the rule against First and Fourteenth Amendment challenge. This Court in June 1985 vacated the Iowa court's judgment (105 S. Ct. 2693) and remanded the cause for further consideration in light of *Zauderer* v. *Office of Disciplinary Counsel*, No. 83-2166 (May 28, 1985). On remand, the Iowa court in November 1985 reaffirmed its initial decision, "find[ing] nothing in the *Zauderer* holding at variance with our prior decision." (App. 26a.)

1. The Advertisements

Over a three-day period in early September 1982, the law firm of Humphrey, Haas & Gritzner aired three advertisements over WHO-TV in Des Moines, Iowa. The first ad featured an actor and actress portraying a physician and a nurse in an examination room. While the nurse looked at an X ray, the doctor addressed the viewer:

> "We see first-hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of a lawyer could be important. That's something to think about."

The second ad featured an actor portraying a printer. Standing in front of a printing press, he addressed the viewer:

> "I suffered loss of wages, incurred staggering medical bills and endured pain and suffering all through the negligence of others. I wasn't aware of my legal rights. I should have been talking to a lawyer."

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pictures; but the use of live action and background sound — the crux of the controversy in this case — remains forbidden.

The third featured two actors portraying bowling partners. The following conversation took place at the lanes:

"Bowler #1: I've got to throw like that today, we're one man short.

Bowler #2: He was injured through the negligence of others.

Bowler #1: He should be talking to a lawyer.

Bowler #2: The choice of that lawyer will be important.

Bowler #1: That's something to think about."

After the dramatization, the scene in each ad shifted to the reception area of a law office, with an actress portraying a receptionist. As the name, address, and phone number of the firm were superimposed on this picture, an off-camera announcer said:

> "If you're injured through the negligence of others, call the law firm of Humphrey, Haas & Gritzner. Cases involving auto accidents, work comp, serious personal injuries and wrongful death handled on a percentage basis. No charge for the initial consultation. Call now at 288-0102."

2. The Complaint and Answer

The three ads were scheduled to run four days a week for 47 weeks. (Tr. 25.)[2] After three days on the air, however, they were discontinued by the station at the request of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. (Tr. 29.) The Committee then brought an original action in the Iowa Supreme Court against Humphrey, Haas & Gritzner, alleging that

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[2] "Tr." refers to the transcript of the evidentiary hearing ordered by the Iowa Supreme Court in this case. See pp. 6-8, below.

their ads violated DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers because they

> "contain more than a single nondramatic voice, have background sound and visual displays of two or more people characterizing themselves as clients which make laudatory comments as to Defendants' services." Petition ¶ 7 (App. 72a).[3]

The Committee asked that the Iowa Supreme Court permanently enjoin the lawyers from airing the ads in question or any other ads that violate the Code (App. 73a-74a); meanwhile, it initiated a disciplinary investigation of Humphrey and Haas, which has been stayed pending disposition of this action.[4] On September 14, 1982, the Iowa Supreme Court, on the Committee's *ex parte* application, enjoined Humphrey and Haas from airing their ads pending further proceedings. (App. 81a-82a.)

Humphrey and Haas did not dispute that their ads used more than a single voice and contained background sound and visual displays. But, seeking both to defend against the requested injunction and to invalidate the rule on its face, they urged that DR 2-101's restrictions of lawyer advertising violate the First and Fourteenth Amendments, both facially and as applied; and they urged that

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[3] In addition to DR 2-101(B)'s ban on dramatization (App. 59a), DR 2-101(A) prohibits "self-laudatory" statements in lawyer advertising (App. 58a). The Committee alleged that the ads also violated DR 2-105 (App. 65a-70a), which, at the time, allowed lawyers advertising in print to list not more than three fields of practice and required that such listings be accompanied by a disclaimer of expertise. Petition ¶ 8 (App. 72a). Because of subsequent amendments to the rules, the Iowa court's judgment on remand does not present any question under DR 2-105.

[4] Committee on Professional Ethics and Conduct, *In re Humphrey, Haas & Gritzner,* File No. 8283-53 (notice of complaint issued September 16, 1982). After the Committee commenced its action, Gritzner withdrew from the firm and was dismissed as a defendant.

the rule's ban on the use of "dramatic" voices and "self-laudatory" statements is impermissibly vague. (App. 76a-80a.)

3. The Evidentiary Hearing

Two weeks after the Iowa Supreme Court entered its injunction, it appointed a commissioner to conduct an evidentiary hearing and to prepare a written summary of the evidence. (App. 83a.) Following discovery, the hearing was held, and the commissioner's summary was filed with the court on November 16, 1983. (App.85a.) The evidentiary hearing focused entirely on the state's justification for DR 2-101's prohibition of dramatization in lawyer advertising on television, and on the supposedly objectionable characteristics of the three ads.

The Committee's principal justification for DR 2-101's prohibition was that dramatization may appeal to a viewer's "emotions," interfering with "rational" choice, and that dramatization is "unnecessary" to convey pertinent information. Former Justice Robert Allbee, who was a member of the Iowa Supreme Court when it adopted DR 2-101(B), explained that the likely viewers of such advertising "are ordinarily of a lower intellectual category and they are less able to make an objective conclusion from something that is passed by them in dramatic form." (Tr. 95.)[5]

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[5] In addition to "prevent[ing] purely emotional reactions or emotional impact in the selection of lawyers" (Tr. 86-87), Justice Allbee testified that the ban was intended "to guard the public against deception either inadvertent or intended, and in turn to protect the trust and the integrity that we want the public to have in the legal profession. That the public not obtain the view that merchandising legal services is like merchandising vintage wine." (Tr. 87; see App. 89a.)

The Committee made no claim that the ads were in fact false, deceptive, or misleading. To the contrary, Dr. Richard Haynes, an expert retained by the Committee, testified that he saw nothing inherently misleading or deceptive in the use of dramatization (Tr. 210-12; see App. 91a), and that the ads in question had not been perceived as misleading or deceptive by a group of viewers paid by him to watch them. (Tr. 210, 258; see App. 90a.) He affirmed that dramatization is effective precisely because it "involve[s] and interest[s] the viewer" (Tr. 276); indeed, he found that 75 percent of the viewers paid to watch the ads rated them a fair-to-excellent way of educating viewers about their rights. (Tr. 265.)

The Committee's counsel sought to elicit testimony that dramatization in television advertising can generate an exaggerated sense of need for a lawyer's services, and can imply distinctions between lawyers that are no more genuine than the distinctions between name-brand and generic aspirin. But none of the evidence suggested that any such effects are either inherent in or peculiar to dramatized television advertising. Nor was there any evidence that the ads here caused such effects or that such effects, if they were to occur, would distort consumer choice. The defense presented extensive testimony that lawyer advertising does not create a need for legal services and that a consumer's exercise of choice is inevitably more deliberate in hiring a lawyer than in purchasing bathroom tissue. (*E.g.*, Tr. 335, 618-19, 699.)

The Committee did not controvert the extensive defense evidence that dramatization is critical for effective television advertising. The evidence demonstrated, to the contrary, that dramatization enables advertisers to capture the viewer's attention (*e.g.*, Tr. 378, 562, 686), causes the

viewer to remember the message being conveyed (*e.g.*, Tr. 281, 379, 712), and "break[s] down the barrier that exists between the public and lawyers" (Tr. 457). The Committee offered no evidence to rebut the testimony of defense witnesses that ads conforming to the restrictions of DR 2-101 are more likely to mislead viewers than dramatized ads precisely because they look *less like ads* than those employing dramatization. (*E.g.*, Tr. 688, 690-91, 754.)

Lori Andrews, research attorney for the American Bar Foundation and former staff director of the ABA Commission on Advertising, testified that more than 40 states permit lawyer advertising on television using dramatization, visual displays, background sounds, and the like. (Tr. 330-31; see App. 91a.) She pointed out that DR 2-101 contains independent prohibitions against false, deceptive, and misleading statements or claims in lawyer advertising (Tr. 334), and she noted that the trend is simply to forbid such statements or claims, and to permit ads of the type aired in this case. (Tr. 332; see App. 92a.)[6]

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[6] As of January 1986, five other states — Kansas, New Jersey, Vermont, West Virginia, and Wyoming — had on their books television advertising restrictions comparable to Iowa's or more severe. See Kan. DR 2-101(B); N.J. RPC 7.2(a); Vt. DR 2-101(B) & (D); W. Va. DR 2-101(B); Wyo. DR 2-101(B). Amendments that would relax these restrictions are under consideration in Kansas and West Virginia.

Rule 7.2(a) of the ABA's Model Rules of Professional Conduct permits lawyer advertising through any public media, including television, so long as it is not false or misleading and does not involve "solicitation." DR 2-101(B) of the ABA's Model Code of Professional Responsibility also permitted lawyer advertising on television, without special restrictions based on the lawyer's choice of medium. The ABA's Comment on Model Rule 7.2(a) states:

> "Television is now one of the most powerful media for getting information to the public, particularly persons of low

4. The Iowa Court's Initial Decision

Notwithstanding this record — or the views of the Federal Trade Commission, which filed an *amicus* brief supporting Humphrey and Haas[7] — the Iowa Supreme Court in September 1984 sustained the restrictions sought to be enforced by the Committee and enjoined Humphrey and Haas from airing the ads in question. Disclaiming any suggestion "that the advertisements here were deceitful" (App. 11a), the court nevertheless enjoined them from being aired on the strength of DR 2-101. It rejected Humphrey and Haas' contention that the rule's blanket ban on dramatization is "more extensive than necessary" to serve any substantial state interest. "All that is prohibited," the

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> or moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant."

ABA's Model Rules of Professional Conduct, *reprinted in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, p. 01:166 (1985).

[7] The FTC stated, among other things, that "[t]he use of dramatizations containing characterizations, visual displays and background sound can provide a truthful, non-deceptive *and effective* means of conveying important information about legal rights and the availability and cost of legal services." FTC *amicus* brief at 15 (emphasis added). In November 1984, the Staff of the FTC's Cleveland Regional Office and the FTC's Bureau of Economics issued a report concluding that content-based and media-based restrictions on lawyer advertising inhibit the extent of advertising and result in significantly higher prices for legal services. *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* 126-27 (Nov. 1984). Its recommended approach is even more liberal than the ABA's Model Rule 7.2. See *id.* at 150-53, 156-57.

court stated, "are the tools which would manipulate the viewer's mind and will." (App. 13a.)[8]

The court also rejected Humphrey and Haas' contention that DR 2-101's ban on "dramatic" voices and "self-laudatory" statements is impermissibly vague. It did so merely by remarking that the phrase "nondramatic voice" is "a simple [one] which we think is commonly understood" (App. 14a), and by noting that "[t]he dictionary meaning of 'laudatory' is 'expressing praise.' " (*Id.*)

Two justices dissented, finding it "undisputed that the effect of these limitations on technique is to substantially diminish the effectiveness of any television advertising." (App. 15a.) The dissenters stressed that the Committee's own expert had testified that dramatization is not inherently misleading, and that the ads in fact were not misleading to the survey group. (App. 16a.) They disputed the majority's conclusion that "because television is the medium, a mere *chance* of deceit is sufficient" to sustain the restrictions at issue. (App. 17a.) They pointed out that this Court's statements recognizing the value of fostering rational, intelligent, and voluntary decisionmaking were meant "to expand the scope of lawyer advertising, not to throttle it." (App. 21a.)

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[8] The court also seemed to accept the Committee's assertion — made for the first time in its brief but without support in the evidentiary record — that, "in the medium defendants chose," the ads could "mislead people into believing that pursuing the listed cases is a cost-free venture," and might cause some viewers to infer that Humphrey and Haas were more experienced than they in fact were. (App. 11a.) The court did not explain how "*the medium defendants chose*" was responsible for either supposed misrepresentation, or on what basis the court accepted the Committee's claims.

5. The Iowa Court's Decision on Remand

Humphrey and Haas sought review of the Iowa Supreme Court's September 1984 decision and on June 10, 1985, this Court vacated the Iowa court's judgment (105 S. Ct. 2693) and remanded the case for further consideration in light of *Zauderer* v. *Office of Disciplinary Counsel,* 105 S. Ct. 2265 (1985).[9] On remand, Humphrey and Haas argued that the logic of this Court's decision invalidating Ohio's blanket ban on illustrations in print advertising fully applied to bans on dramatization in broadcast advertising – that a generalized fear of audience "manipulation" could no more justify "broad prophylactic rules" here than in *Zauderer* and that, as there, the possibility of policing abuses on a case-by-case basis made the prophylactic approach taken by Iowa untenable. See *Zauderer,* 105 S. Ct. at 2280-81.

Nevertheless, the Iowa court reaffirmed its initial decision sustaining DR 2-101(B), "find[ing] nothing in the *Zauderer* holding at variance with our prior decision." (App. 26a.) The Iowa court reaffirmed its view that the manipulative capabilities of electronic media advertising justified the prophylactic approach embodied in DR 2-101 (B), and it suggested that the potential use of television for "crass personal promotion" by lawyers eager "to improve their image" also justified the rule's proscriptions. (App. 31a-33a.) The only "harm" that it identified in discussing the manipulative capabilities of Humphrey and Haas' ads, however, was the possibility that some viewers might

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[9] Justice Rehnquist and Justice O'Connor would have noted probable jurisdiction and set the case for oral argument. 105 S. Ct. 2693.

be prompted to "grab the phone and make a call" without giving the matter sufficient reflection. (App. 31a.)[10]

Justice Larson, joined by Justice McCormick, again dissented. He noted, among other things, that problems of policing could be met "by requiring copies of a telecast or broadcast to be kept for a specified period of time," as several states require, and as ABA Model Rule 7.2(b) provides (App. 48a), and he stressed the state's lack of justification for its "outright ban" on dramatization (App. 50a). "A prophylactic rule, aimed at preventing possible abuses in some cases by imposing a ban for all cases, has been rejected by the Supreme Court." (App. 49a, citing *Zauderer.*)[11]

Although the majority went out of its way to "deny that [its] rule amounts to a blanket ban, in the sense proscribed by *Zauderer*" (App. 33a), the rule — and the court's decision sustaining it — have effectively outlawed television advertising by lawyers in Iowa.[12]

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[10] The court lost only one member of its original majority, Justice Uhlenhopp, who concluded that "the rules which defendants challenge cannot stand" in light of *Zauderer.* (App. 43a.) Chief Justice Reynoldson, concurring specially, condemned *Zauderer* itself for "endanger[ing] the capability of the courts to identify and dislodge lawyer print advertising that is false, deceptive, or misleading." (App. 41a.) Although he complained that state courts lack the resources to police "dishonest scams" even in the print media (App. 36a), he did not address the fact that at least 44 states permit what DR 2-101(B) forbids.

[11] Much of Justice Larson's dissent attacks a provision of DR 2-101(A) deleted by the court in an order entered five days before its opinion on remand was issued — a proviso forbidding lawyers to communicate any information not "specifically permitted" by rule. The questions presented by such a restriction, which Humphrey and Haas raised in their initial appeal in this case, are no longer live.

[12] See Affidavit of Norton C. Frickey, II, ¶ 6 (App. 97a-99a), prepared after the entry of the Iowa court's judgment on remand. Mr. Frickey, vice-president of the company that produced the television

THE QUESTIONS ARE SUBSTANTIAL

The Iowa Supreme Court has treated this case as though all of the rules that this Court has established for lawyer advertising in the print media are inapplicable simply because this case involves television. But television is "one of the most powerful media for getting information to the public" (ABA Comment on Model Rule 7.2(a)), and nothing in this Court's cases suggests that merely because this medium is involved all First Amendment bets are off. There may be characteristics of the electronic media that warrant special treatment, but none of the differences between television and other media support the broad prophylactic restriction upheld here. Based on nothing more than unsubstantiated fears of audience manipulability and concerns that the medium might be misused, Iowa has drastically and gratuitously limited the effective use of television by lawyers. The state may not be reconciled to the standards announced by this Court in its lawyer advertising cases or in its commercial speech cases generally; but judged by those standards, Iowa's rule — both on its face and as applied — is clearly unconstitutional. For this reason, and for the other reasons discussed below, the Iowa court's judgment cannot stand.

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ads at issue in this case, polled the 14 largest television stations in Iowa this January and confirmed that there is virtually no television advertising by lawyers in the state. Three of the stations that he polled specifically cited DR 2-101(B) and the Iowa Supreme Court's decision as the reason. Meanwhile, according to a September 1985 report by the Television Bureau of Advertising, lawyers spent $28.2 million on television advertising nationwide in 1984 — a 58 percent increase over the previous year — and their spending increased by one-third in the first half of 1985. *TvB News*, Sept. 27, 1985, p. 1.

A. The Ban on Dramatization Violates the First Amendment on Its Face and as Applied

In sustaining DR 2-101(B)'s restriction on lawyer advertising on television to displays of what may appear in a printed advertisement, accompanied only by an off-screen "nondramatic" voice, the Iowa court disobeyed the teachings of this Court's lawyer advertising cases, *Zauderer, supra; In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates* v. *State Bar*, 433 U.S. 350 (1977). Those cases teach that a state may impose prophylactic restrictions on lawyer advertising *only* "where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive" (*R.M.J.*, 455 U.S. at 202), and "the potential abuses . . . cannot be combatted by any means short of a blanket ban." *Zauderer*, 105 S. Ct. at 2281. See *Ohralik*, 436 U.S. at 466; *R.M.J.*, 455 U.S. at 203, 206-07.

There is no claim that the ads here were false, misleading, or deceptive. To the contrary, the Committee's expert witness specifically testified that the ads were not in fact misleading or deceptive, and the Iowa Supreme Court itself disclaimed any suggestion "that the advertisements here were deceitful." (App. 11a.)[13] The Committee's expert testified, moreover, that he found nothing inherently

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[13] The only actual "harm" that the Iowa court identified was the possibility that the dramatization in Humphrey and Haas' ads might prompt some viewers to "grab the phone and make a call" without giving the matter due reflection. (App. 31a.) Even if this were so, it could not justify a ban on a means of expression shown to be so critical in attracting viewer attention. Viewers would not call Humphrey and Haas "merely to ascertain if they have a clean bill of legal health." *Bates*, 433 U.S. at 374.

misleading or deceptive in the use of dramatization, and he conceded that dramatization is effective in television advertising precisely because it "involve[s] and interest[s] the viewer." (Tr. 276.) Thus, the question presented is whether the state may enforce a prophylactic rule to enjoin Humphrey and Haas from airing *their* ads on the theory that *other* dramatized television ads *might* be deceptive. As *Zauderer* confirmed, however, the First Amendment permits no such prophylactic rule.

The Iowa Supreme Court upheld DR 2-101(B)'s prohibition on the basis of its unsubstantiated belief that television dramatization "manipulate[s] the viewer's mind and will" – despite this Court's admonition that "commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.' " *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 92 n.6 (1977); *Bates,* 433 U.S. at 374-75. Although it hinted that it considers the task of policing electronic media advertising unmanageable (App. 30a-31a & n.2), it offered no "evidence or authority" for this view (*Zauderer,* 105 S. Ct. at 2281); and the practice of the other states – and the approach embodied in the ABA's Model Rule 7.2 (b) – belies this concern.[14] In striking down Ohio's illustration

[14] At least 36 states require lawyers to retain copies of the ads they air and some require lawyers to make these copies available to state authorities after airing. See Ala. Temp. DR 2-102(B); Alaska DR 2-101(D); Ariz. ER 7.2(b); Ark. R. 7.2(b); Cal. R. 2-101(E); Colo. DR 2-101(D); Del. R. 7.1(c)(3); D.C. DR 2-101(D); Fla. DR 2-101(D); Ga. R. 4-102, Stand. 7(B); Hawaii DR 2-101(D); Ill. R. 2-101(e); Ind. DR 2-101(E); Ky. SCR 3.135(6)(a)(ii); Me. R. 3.9(d); Minn. R. 7.2(b); Miss. DR 2-101(D); Mo. R. 7.2(b); Mont. R. 7.2(b); Neb. DR 2-101(B); Nev. R. 164(3); N.H. R. 7.2(b); N.M. DR 2-101(I); N.Y. DR 2-101(F); N.C. R. 2.2(B); N.D. DR 2-101(D); Ohio DR 2-101(D); Okla. DR 2-102(B); Ore. DR 2-101(C); S.C. DR 2-101(D)(1); S.D. DR 2-101(D); Tenn. DR 2-101(F); Tex. DR 2-101(E); Utah DR 2-101(A)(2); Va. DR 2-101(B); Wash. RPC 7.2(b). See also ABA Model Code DR 2-101(D).

ban in *Zauderer*, this Court in fact cited a *television* case for the proposition that advertising abuses in "the visual media" may be, and therefore must be, policed on a case-by-case basis. 105 S. Ct. at 2281 (citing *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965)).[15]

The Iowa court *may* have upheld DR 2-101(B) on the supposition that the likely viewers of lawyer advertising on television "are ordinarily of a lower intellectual category and [thus] less able to make an objective conclusion from something that is passed by them in dramatic form." (See p. 6, above.) But this Court has squarely rejected restrictions premised on the assumption "that the public is not sophisticated enough to realize the limitations of advertising." *Bates, supra*, 433 U.S. at 374-75. It has refused to restrict lawyer advertising when the restriction "rests on an underestimation of the public." *Id.* "If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Id.* at 375.

Nor is there any foundation in the First Amendment for justifying DR 2-101(B)'s ban on the ground that dramatization appeals to the "emotions" rather than "reason."[16]

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[15] The Iowa court's concern that dramatization may facilitate "crass personal promotion" by lawyers (App. 32a-33a) is likewise insufficient to sustain DR 2-101(B)'s ban. This Court rejected a comparable justification in *Bates*, 433 U.S. at 368-72, and in any case the state does not need a blanket ban on dramatization to avoid the specific form of promotion with which the majority seemed to be concerned — celebrity endorsements.

[16] DR 2-101(A) includes a separate injunction against lawyer advertisements that "appeal to the emotions" (App. 58a), whatever this phrase may mean. Cf. *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945); *Primus*, 436 U.S. at 431-32.

As the evidence in this case demonstrates, drama can facilitate effective communication by capturing a viewer's attention through a personal appeal to the viewer's needs — an approach that the Iowa court condemned as "manipulative" — while viewers may be more easily misled by advertising that purports to be "objective" than by advertising that makes no secret of its commercial aims. Dramatization, like the use of illustrations or pictures in *Zauderer,* "serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." 105 S. Ct. at 2280. The Iowa Supreme Court believed that DR 2-101(B) draws a permissible line "between what informs the public and what promotes the lawyer" (App. 12a), but as Justice Larson observed in dissent, the rule is in fact "a prescription for dullness" — one that "substantially diminish[es] the effectiveness of any television advertising" (App. 15a).

The Iowa court, both in its initial decision (App. 9a-10a), and in its decision on remand (App. 29a-30a), invoked this Court's admonition that "the special problems of advertising on the electronic broadcast media will warrant special consideration." *Bates,* 433 U.S. at 384. See also *Zauderer,* 105 S. Ct. at 2294 n.1 (O'Connor, J.). Reliance on this admonition was misplaced here. Although the broadcast media undoubtedly have "established a uniquely pervasive presence" in our lives, *FCC* v. *Pacifica Foundation,* 438 U.S. 726, 748 (1978), this alone cannot justify special restrictions on otherwise protected commercial speech. This is not a case in which a restriction on advertising in the electronic media can be justified by the government's interest in protecting innocent young minds (compare *Pacifica*), or on the ground that the product being advertised is itself reputedly harmful (compare

Capital Broadcasting Co. v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) (3-judge court), *aff'd mem.,* 405 U.S. 1000 (1972)). Whatever the Iowa court may believe about the manipulative capabilities of television advertising, there is simply no support in the extensive record in this case — in fact, the Committee's own evidence is to the contrary — that the use of dramatization in television advertising by lawyers is inherently misleading or deceptive so as to justify a complete prophylactic proscription.

B. The Ads Here Were Not Potentially Misleading "In the Medium Defendants Chose"

Humphrey and Haas also seek review of the Iowa court's conclusion that, "in the medium defendants chose," their ads were potentially misleading with respect to cost and quality of service. (App. 11a.) *First,* the court offered no support (and the record contained none) for its conclusion that the ads could well "mislead people into believing that pursuing the listed cases is a cost-free venture" (App. 10a-11a); nor did the court supply any explanation for its view that *television* was responsible for this supposed deception.[17] *Second,* nothing in the ads overstated Humphrey and Haas' qualifications in the fields of practice they listed; at most, the ads implied that they *were*

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[17] We do not question Iowa's power to require appropriate disclosures where, as here, lawyers offer to handle cases on a "percentage basis." See *Zauderer,* 105 S. Ct. at 2282. But as Justice Larson noted in his initial dissent (App. 19a), no such disclosures are required under Iowa's rules. The rules, as they stood when Humphrey and Haas aired their ads, required only that lawyers offering to handle cases on a "contingent-fee" basis indicate whether fees are computed "before or after deduction of costs," and Humphrey and Haas were not charged with violating the rule requiring such a disclosure. The Iowa court subsequently added a more elaborate disclosure requirement (App. 61a), which is not at issue here.

qualified to practice in those fields, and, as the dissent stated, "there is no evidence, nor even a claim, that they were in fact not qualified." (App. 20a.)[18] Offering no discussion, the majority merely said it thought viewers *might* think Humphrey and Haas more able than they are (App. 11a); but this Court in *Zauderer* confirmed that a state may not "prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has expertise in those areas." 105 S. Ct. at 2276 n.9.

Wholly apart from the First Amendment obstacles to the Iowa court's conclusion that the ads were potentially misleading with respect to cost or quality of service, it plainly violated due process for the court to enjoin Humphrey and Haas from running their ads on this ground — or for its findings in this respect here to support possible future disciplinary action against Humphrey and Haas. The Committee's complaint did not allege that the ads were misleading in any respect, and it presented no evidence on these matters at the hearing before the commissioner. It first raised these claims in its brief to the Iowa court, obviously groping for some solid basis for the relief it had requested. Although a majority of this Court rejected a due process attack on similar maneuvering by state authorities in *Zauderer* (105 S. Ct. at 2283-84), the issue should be reconsidered here. It is intolerably per-

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[18] Humphrey, a 1979 Drake Law School graduate, had been editor-in-chief of the law review and had clerked for a federal magistrate during law school. Haas, also a 1979 Drake Law School graduate, was also on the law review and served as student bar president. As of the summer of 1983, the two lawyers (who had formed their firm in November 1980) had handled or were handling over 150 personal injury cases, in addition to their worker's compensation cases.

nicious for state authorities, unable to muster proof of their charges in evidentiary hearings, to be permitted at the briefing stage to urge remedial action on entirely new grounds. See *id.* at 2292-93 (Brennan, J., joined by Marshall, J., dissenting in part).

C. The Ban on "Dramatic" Voices and "Self-Laudatory" Statements Also Violates The First Amendment

The Iowa court sustained DR 2-101(A)'s ban on "dramatic" voices without analysis; to it, the meaning of the term is "commonly understood," and therefore DR 2-101(A)'s ban could not be condemned as vague. Humphrey and Haas submit that the court was wrong. A ban on the use of "dramatic" voices is inherently vague, for there is no voice that cannot be considered "dramatic," and no principled basis for distinguishing between the voice that is "dramatic" and a voice that is not. Indeed, by prohibiting a lawyer from speaking in his own television ads, the rule requires a lawyer to employ an actor if he desires to have his message heard; and it is hard to imagine how an actor's voice could be regarded as anything other than "dramatic."

No test of intonation or other criterion is provided by the rule for determining when a voice is "dramatic," and the rule's prescription is thus a recipe for arbitrary and discriminatory treatment of lawyers who advertise on television. This case is a perfect illustration. There was no shouting in the ads in question; there were no histrionics. The ads involved actors playing everyday people, speaking in everyday language about everyday needs, in perfectly measured tones. If there was anything "dramatic" about their voices, neither the Committee nor the Iowa Supreme Court explained what it was.

Nor could Humphrey and Haas ever have suspected that the ads would be deemed "self-laudatory." Their ads made no claim as to the quality of their services, did not recite their credentials (although the rules permit credentials to be listed), and did not claim or suggest that the firm would render better service than other firms. If these ads were "self-laudatory," then all ads are "self-laudatory," and the ban on "self-laudatory" statements amounts to a ban on all ads. Applied to enjoin these ads on the ground that they contain "self-laudatory" statements in violation of DR 2-101(A), the rule is impermissibly vague – equivalent to the blanket advertising prohibitions held impermissible by *Bates* and its progeny.

CONCLUSION

Probable jurisdiction should be noted and the case set for briefing and argument.

Respectfully submitted,

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